

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEAN E. READ

Claimant

VS.

BLACK & WINSOR

Respondent

AND

COMMERCE & INDUSTRY INS. CO.

Insurance Carrier

Docket No. 1,017,952

ORDER

Respondent and its insurance carrier request review of the December 27, 2005 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The claimant suffered a work-related injury to his right hand that ultimately required surgery. After the hand surgery the claimant was referred for an extended period of physical therapy, three times a week for eight weeks. Claimant stated he then developed shoulder pain and his treating physician referred him to another doctor who recommended arthroscopic surgery for the shoulder. The issue at the preliminary hearing was whether the shoulder problems were work-related.

The Administrative Law Judge (ALJ) quoted the doctor who performed the hand surgery and had offered an opinion that the shoulder was a consequence of immobilization and favoring the extremity because of the hand surgery. The ALJ also quoted the doctor who examined claimant's shoulder and noted that work aggravated the shoulder condition. The ALJ ordered respondent to pay temporary total disability compensation as well as medical treatment for claimant's shoulder with Dr. John D. Osland.

The respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. Respondent argues claimant's shoulder complaints were not noted by the treating physician until approximately five months after he had concluded physical therapy. Respondent further argues this delay in complaints

coupled with the finding claimant suffers from arthritis in the shoulder do not support a finding that work activities caused or aggravated the shoulder.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant injured his right hand while pushing and pulling containers of mail in order to load and unload a truck he drove to deliver mail to substations. He was referred for medical treatment with Dr. George L. Lucas and continued working even though the doctor had placed restrictions on him. Claimant indicated that he began using his right shoulder to move the containers because of the ongoing problems with his right hand.

Finally, Dr. Lucas performed surgery on claimant's right hand in January 2005. Post-surgery treatment included a regime of physical therapy three times a week for eight weeks. This involved the entire upper extremity including hand and finger exercises. The claimant experienced increased pain in his right shoulder during physical therapy. Although claimant alleged he told Dr. Lucas that his shoulder was hurting, the first shoulder complaints appeared in Dr. Lucas' medical records dated August 2, 2005.

Dr. Lucas' medical records confirm claimant continued to experience pain after the surgery. The pain was not limited to claimant's hand and included the ulnar volar aspect of his forearm. And Dr. Lucas' medical record dated June 28, 2005, indicated claimant had seen Dr. Melhorn and at one point been scheduled for cubital tunnel and carpal tunnel surgery.

In a letter dated August 22, 2005, Dr. Lucas wrote the claimant's case manager and indicated the shoulder problem was related to immobilization and protected movement of the extremity due to the hand surgery. The doctor explained in part:

The situation in terms of the shoulder is that frequently people who have injuries to their hand or surgery to their hand develop tendonitis in the shoulder, probably because of protected movements that they do with the extremity and perhaps immobilization. Similarly, patients can develop cubital tunnel syndrome while convalescing from hand injury, largely because they sit around with their elbows in a flexed posture, which of course puts pressure on the ulnar nerve.¹

¹ P.H. Trans., Cl. Ex. 1.

Dr. Lucas referred claimant as a result of his shoulder complaints to Dr. Osland who examined claimant on September 6, 2005, and was provided a history that claimant had originally injured his shoulder as well as his hand but his shoulder had improved until about five months before the office visit. Dr. Osland ordered an MRI. The MRI did not reveal a rotator cuff tear but indicated there was pressure on the supraspinatus muscle and tendon by a spur at the acromioclavicular joint.

In his medical note dated October 18, 2005, Dr. Osland's impression was claimant had right shoulder AC degenerative joint changes. The doctor noted that the claimant's condition was not all due to one traumatic injury, but claimant's work related accident "probably aggravated it some."² The doctor recommended a right shoulder arthroscopy with a distal clavicle excision and subacromial decompression.

In a letter dated October 18, 2005, Dr. Osland responded to a letter from respondent's counsel and again concluded that claimant's shoulder injury was more of an arthritic-type condition not directly related to work but noted work was indirectly a factor. The doctor wrote in part:

In going through my notes from my dictation on September 6, and then also the followup visit September 28, I feel that Mr. Read's injury to his shoulder is more of an arthritic-type condition. It is not an acute injury that he has had, so I do not feel that his shoulder problem is related to his work directly. It may be indirectly related to it.³

At the preliminary hearing, the respondent's counsel stated he then contacted Dr. Osland and told the doctor that claimant had not worked since January or February 2005 and claimant's shoulder complaints did not appear until August.⁴

Dr. Osland then sent respondent's counsel a letter dated November 21, 2005, which again noted claimant's shoulder injury was not directly work related but the doctor equivocated and noted because claimant moved his shoulder at work that activity could make his arthritic shoulder condition worse. The doctor wrote in part:

I feel that Mr. Read's injury is not related to his work. He does have an arthritic condition. Arthritic conditions can get worse with moving your shoulder. He did move his shoulder at work; therefore, his work could make his shoulder worse. I

² *Id.*

³ *Id.*

⁴ *Id.* at 5.

feel that he would have had this arthritic problem even if he did not do this type of work; so I do not feel his problem is directly related to his work.⁵

It must be noted that Dr. Osland was provided an incorrect history of the onset of claimant's shoulder pain. Claimant had provided Dr. Osland a history of shoulder pain contemporaneous with the onset of his right hand pain. Claimant noted that it had improved but subsequently worsened during his physical therapy after the hand surgery. On cross-examination at the preliminary hearing, the claimant indicated that his shoulder symptoms occurred in March and April 2005.⁶ Claimant's physical therapy ended sometime in the latter part of March 2005.⁷

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁸ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁹

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*¹⁰, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Kansas law is also well-settled that injuries that occur during therapy for a work-related injury are also compensable, as those later injuries are the direct and natural result of the initial work-related injury.

⁵ *Id.*, Ex. 1.

⁶ *Id.* at 17.

⁷ *Id.*

⁸ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

An injury which occurs during a participation in a work-hardening program or functional capacity evaluation made necessary by a previous work-related injury is a direct and natural result of the previous injury.¹¹

In this instance the claimant noted right shoulder pain contemporaneous with his hand injury but the shoulder pain initially improved. Claimant then participated in a lengthy period of physical therapy which resulted in increased shoulder pain. This activity aggravated the claimant's preexisting arthritic right shoulder which had previously been asymptomatic. Dr. Osland noted that activity could worsen the shoulder condition.

Based upon the record compiled to date, the Board finds that it is more probably true than not that claimant aggravated his right shoulder condition during the physical therapy that he received for his right hand injury.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated December 27, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2006.

BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ *Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, Syl. ¶ 2, 995 P.2d 855 (2000).